Supreme Court of the United States.

OCTOBER TERM—1900.

E. M. PATTON,
Plaintiff in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 123.

STATEMENT.

The statement in the brief of plaintiff in error omits to recite that plaintiff testified:

"I had my work to do on the engine at Toyah, and I remember getting off of it late in the afternoon of the Sunday mentioned, and when I got off of it *on the right side* after I did my work, I saw the jackscrews sitting about the engine. This was about the time I left the engine and went to supper. * * * I do not think that I used this step in getting off the engine on the way from Toyah back to El Easo. After we got to El Paso we got off on *the right side.* I don't remember whether I used the step" (Tr., p. 21).

The Engineer, Stiner, testified that he used the step several times on the return journey to El Paso (Tr., p. 22).

After reviewing the evidence, the Circuit Court of Appeals said :

" The uncontradicted facts remain established that the plaintiff himself assisted in fastening the step at El Paso ; that this was sufficient to secure the nut for the round trip to Toyah and back ; that the step was used and was not loose while going and returning ; that after the arrival at El Paso on the return trip the step was used by the plaintiff himself, and was only found loose a few hours afterwards while the engine was under the control of other employees of the railway, whose duty it was to coal it, sand it, and do such other necessary things as might be required, except repairing, and when the engine was to be taken immediately thereafter to the round-house, where it was to be inspected, and where it would, if necessary, have been repaired.

" On such facts, and under the views of this court expressed on the first writ of error, the plaintiff below could not recover " (Rec., pp. 11, 12).

In the first appeal (61 Fed. Rep., 259), the Court, as then constituted, held, after reviewing the evidence, that there was nothing to show negligence on the part of the railway company.

BRIEF.

I.

The plaintiff failed to prove any negligence on the part of the Railway Company, and the trial Court for that reason correctly instructed the jury to find a verdict for the defendant.

The rule of law governing this case upon the record is clearly announced in Delaware, &c., Railroad vs. Converse, 139 U. S., 469, 472, as follows :

"Undoubtedly questions of negligence, in actions like the present one, are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phenix Ins. Co. vs. Doster, 106 U. S., 30, 32.; Griggs vs. Houston, 104 U. S., 553; Randall vs. Baltimore and Ohio Railroad, 109 U. S., 478, 482; Anderson County Commissioners vs. Beal, 113 U. S., 227, 241; Schofield vs. Chicago and St. Paul Railway Co., 114 U. S., 615, 618.* 'It would be an idle proceeding,' this court said in *North Penn. Railroad vs. Commercial Bank, 123 U. S., 727, 733,* 'to submit the evidence to the jury when they could justly find only in one way.'"

In this case the Circuit Court of Appeals, on the first hearing, actually did set aside a verdict for plaintiff on the ground that there was no evidence of negligence by the Railway Company (*61 Fed. Rep., 259*; s. c. *23 U. S. App., 319*); and on the second hearing the same court held that the defect in plaintiff's case had not been cured (Tr., pp. 40–41).

This honorable Court has exercised the same power under similar circumstances (*Wiborg vs. United States, 163 U. S., 632.*

We insist that the first point made in the brief of plaintiff in error (p. 14), namely, that, "If upon any construc tion which the jury is authorized to put upon the evidence, or any inference they can draw from the evidence, the conclusion of negligence can be justified, the question of negligence must be left to the jury," is not applicable to this case, for the reason that, upon the face of the record, no such

inference can be drawn nor any such conclusion justified.

The testimony as it appears in the record has been twice carefully reviewed by the Circuit Court of Appeals for the Fifth Circuit. That court, in its opinion upon the first writ of error, said :

> " It seems to us that to state the case is sufficient to show that the defendant had not been negligent and could not justly be held liable. * * * It appears from the face of the record that there was no evidence to sustain the judgment of the Circuit Court. It is thus manifestly erroneous and must be reversed " [61 Fed. Rep., 269–70].

In its last opinion in which the judgment under review was pronounced the above extract was quoted and the court remarked [Tr., p. 40] :

> " It is clear that the opinion of this court on the former writ of error is the law of this court and is controlling, unless the evidence on the second trial was materially different from the evidence on the first trial."

The only differences in the testimony, taken upon the two trials, upon which plaintiff in error relies are that the testimony of the engineer Stiner was more favorable to plaintiff upon the second trial than it was upon the first; and that upon the second trial Mr. Mitchell testified that the step had been removed during the making of the repairs at Toyah, while he testified on the first trial that it was not taken off. On the second trial he testified that the step was properly replaced and that the nut holding it in place was " screwed up tight " [Tr. p. 23].

We respectfully submit that the testimony of Mitchell as given at the second trial did not in any way tend to prove any negligence on the part of the defendant in error.

We also submit that plaintiff in error fails to point out any testimony showing negligence by the Railway Company. Both the engineer and plaintiff testified in effect that they had no reason to suspect that the step had become loosened. The engineer used it repeatedly on the return journey and plaintiff admits that he got on and off the engine by means of it after the repairs at Toyah were completed and again on arriving at El Paso, but he could not remember that he had occasion to use it during the journey [Tr., p. 21].

Certain it is upon the evidence that plaintiff's opportunities for discovering any defect in the adjustment of the step after the engine left Toyah were precisely the same as those of the engineer and that they were the only persons who had any opportunity whatever to inspect the step or to do anything to it from the time the engine left Toyah until the time when the accident occurred. It is evident that the defect by which it is alleged the accident was caused could not be discovered by the best of all inspections—*actual use* of the step.

In *Railway Company vs. Daniels, 152 U. S., 684, 691*, relied upon by the plaintiff in error as identical in all of its material features with the case at bar, the following charge of the trial judge was approved:

> "As between employer and employee, between master and servant, as in this case, negligence on the part of the former is not proven, or to be inferred, simply from the existence or occurrence of the accident which caused the injury complained of."

We do not overlook the rule stated in *Texas & Pacific Ry. Co. vs. Archibald, 170 U. S., 665*, also relied upon by plaintiff in error, viz., that "an employee has the right to rest on the assumption that

appliances furnished are free from defects *discoverable by proper inspection.*" But we insist that it does not apply to the case at bar, because in the record there is no proof that the Railway Company did not exercise *reasonable care* to make its appliances safe, nor that the defect in the step existed prior to the accident or, if so, that it was discoverable by inspection. The presumption, as well as the proof, is that it did exercise reasonable care.

The most favorable view of the testimony offered by plaintiff as found in the record is that he proved that the step on the engine was found to be loose after the accident, though there was nothing to lead those inspecting or using it previously to suspect that anything was wrong with it, nor to show that, if it was loose prior to the accident, its condition could have been discovered by inspection.

We submit, therefore, that the action of the trial court in directing a verdict for the defendant was not only justified but was the only action the court could take upon the record and the law.

II.

The question whether the engineer of the engine and the plaintiff, who was the fireman, were "fellow servants," as to inspection or otherwise, is not here for review, because it is not presented by any assignment of error.

The only error assigned in the record relates to the direction of the court to the jury to find a verdict for

the defendant because no negligence by the Railway Company had been proven [Tr., p. 31].

The question as to "fellow servants" is a matter of defense, and as such its discussion before plaintiff has established a *prima facie* case is premature and unnecessary.

On the first appeal in this case, reported in 61 Fed. Rep., 259, the judges of the Circuit Court of Appeals used this language (p. 268):

> "It may not have been the duty of the fireman to inspect this step, which he was constantly using, on the run from El Paso to Toyah and return, but it was the duty of his engineer, and they were fellow servants."

The proposition that the engineer and fireman were fellow servants is contested in the brief on the other side in this case. We answer:

FIRST. The Circuit Court of Appeals having in this case, upon the first appeal, decided that the engineer and fireman were, as far as relates to the duty of the engineer to inspect the engine, fellow servants, and the testimony on the second trial being exactly the same as on the first trial, that court had no jurisdiction to reverse its former decision.

Balt. & O. Ry. Co. vs. Baugh, 149 U. S., 368.
Tyler vs. Maguire, 17 Wall., 253.
Washington Bridge Co. vs. Stewart, 3 How., 413.
Sibbald vs. United States, 12 Peters, 488.
The Santa Maria, 10 Wheat., 431.
Frankland vs. Cassady, 62 Texas, 418.
Stacey vs. Vermont Cent. Ry. Co., 32 Vt., 552.

Wells on Res Adjudicata & Stare Decisis, Sec. 613.
23 Am. & Eng. Ency. of Law, 33.

SECOND. The testimony on the second trial being the same as on the first, it was the duty of the Circuit Court to respect and follow the decision rendered by the Circuit Court of Appeals in this case, and to direct a verdict for the defendant.

See cases last cited.

THIRD. The common-law doctrine that the master is not liable for the negligence of a fellow servant in the same employment is a rule which, without any question or dispute, obtains in the state of Texas. The relations of the engineer and fireman, and the circumstances of this particular case, show that it falls within the general rule of fellow servant, and not within the rules established in some exceptional cases, where one servant is supposed to stand in the place of the master in respect of a duty which is personal to the master and incommunicable by him to others. Upon the record it was the duty of the engineer to report in a book kept for the purpose, upon his arrival at the end of a journey, any repairs which it was necessary to make to the engine. Defendant had competent inspectors to inspect engines in the yards, and at the time of the accident the inspectors and mechanics had had no opportunity, under the routine and customs as to handling, coaling, sending and clearing engines, to inspect the engine by which the plaintiff was injured, and this was well known to plaintiff (Rec., p. 19). In this case the engine had not arrived at the roundhouse when the accident occurred, but was in the charge of the "hostler,"

being coaled and cleaned, as was usual before being placed there, and there had been no opportunity for the inspection customarily made of the engine on its arrival. If there was any duty which was personal to the master, and which he could not delegate unaccompanied with responsibility for the neglect of the servant, that duty rested on the inspector, and was known to the plaintiff to rest there, and he, knowing this, jumped or stepped off a moving train without waiting for it to stop, and when he knew as much about the step as the engineer could have known, and without waiting for the inspection of the step to be made in the usual and customary manner and at the proper time and place—the roundhouse. We say, under these circumstances, the law will regard the engineer and the plaintiff as fellow-servants, and the circuit court of appeals was clearly right in so holding.

III.

The fact that the testimony of a witness on the second trial of this cause differed from that given by him on the first trial on points not material to the decision of the only question assigned for error, does not furnish ground for reversing the judgment herein.

We do not dispute the rule that the credibility of a witness is for the jury and not for the court to determine; but we urge and insist that where the discrepancy in

the testimony of such a witness has no bearing upon the only question to be determined by this honorable Court under the error assigned, the judgment under review will not be reversed for the mere purpose of submitting to a jury the credibility of the witness. The Circuit Court of Appeals well said:

"But the fact that Mitchell made two contradictory statements, both of which were favorable to the railway company, cannot be held to be equivalent to or to supply the place of proof of negligence on the part of the railway company directly the reverse of either of the contradictory statements. A bare suspicion that Mitchell did not fasten the step at Toyah, arising merely from the fact that he made two contradictory statements, would not warrant the jury in finding against the railway company" [Tr., p. 41.]

IV.

The judgment under review should be affirmed.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Of Counsel.